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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO ET AL.,
PETITIONERS,

vs.

THE CHICAGO TITLE AND TRUST CO., TRUSTEE,
ET AL.

REPLY BRIEF FOR PETITIONERS.

HENRY S. ROBBINS,
Counsel for Petitioners.

WALLACE HECKMAN,
JAMES G. ELSDON,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 14262

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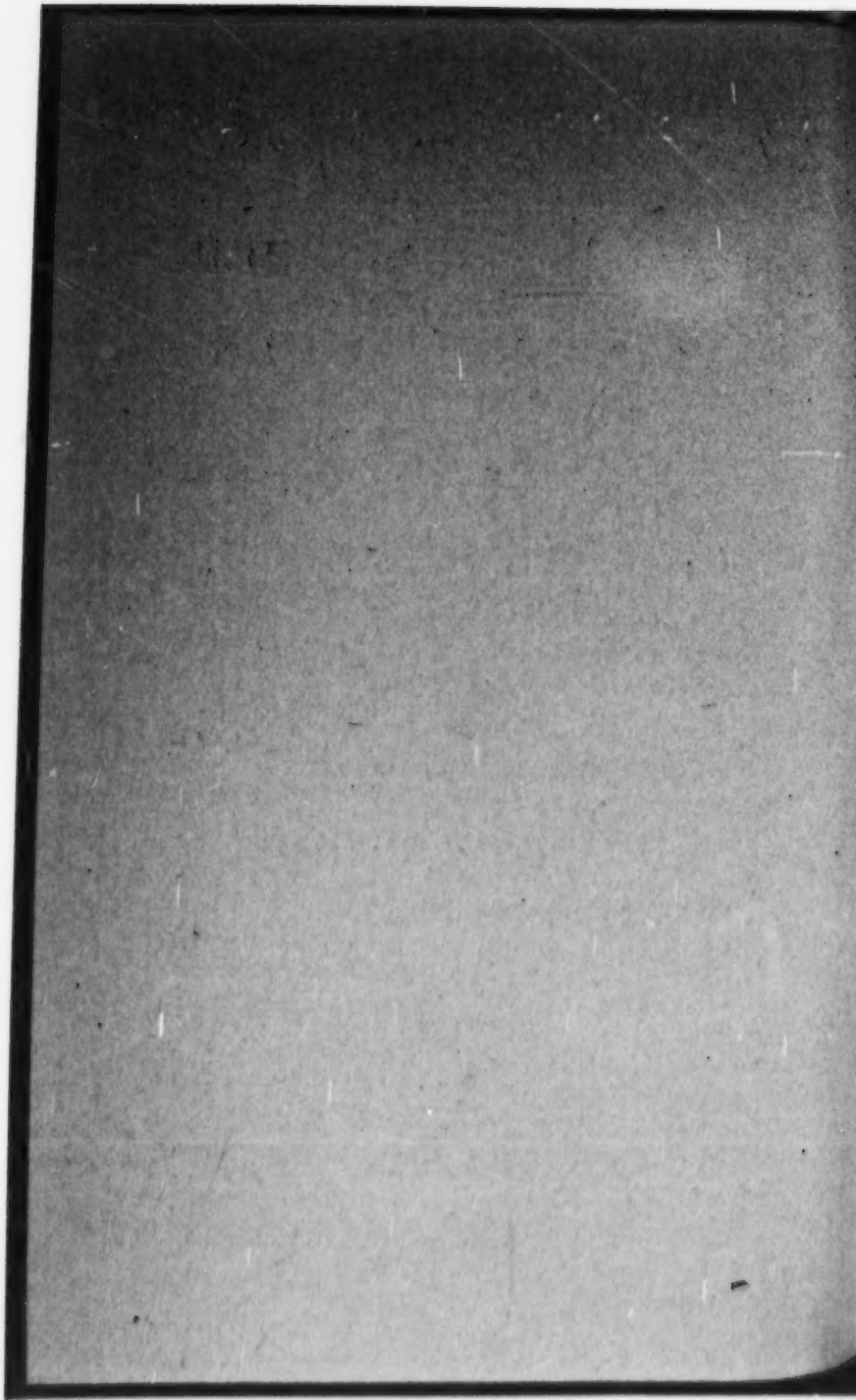

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO ET AL.,
PETITIONERS,

vs.

THE CHICAGO TITLE AND TRUST COMPANY,
TRUSTEE OF ALEXANDER RODGERS, BANKRUPT, ET AL.,
RESPONDENTS.

CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

In reply to respondents' brief, petitioners wish to direct the attention of this honorable court, very briefly, to a single question, namely: *Did the removal by the bankrupt of the lots of seeds referred to by the referee in his report (Rec., 36) and the substitution of other lots of the same kind and quality of seed for those so removed invalidate the pledge?*

There is no question of actual fraud in the case. The conduct of all the parties was found by the referee (Rec., 42) to

have been in good faith, with no intent to cheat or defraud any one. Respondents, on the question as to the effect of the substitutions, cite—

Snydacker *vs.* Blatchley, 177 Ill., 506.

But in that case the court expressly held that, since the writing contained *words of conveyance*, it was a *chattel mortgage* within section 1 of the mortgage law of Illinois. That case applies the rule regarding conveyances, which gives effect to them only so far as the specific property thereby attempted to be conveyed and therein described is concerned. In such a case the validity of the transaction depends wholly upon the instrument of conveyance, and to make such an instrument cover other property than that expressly conveyed by it would plainly be to give effect to a *verbal* understanding or agreement as a *mortgage*, contrary not only to the Illinois statute concerning mortgages, but to the plainest principles of law.

But in the case of a *pledge*, as in the case at bar, the validity of the transaction does not depend, in any sense, upon an instrument of conveyance or other instrument of writing, but solely upon the *delivery of possession of the thing pledged*. It would seem apparent, therefore, that whenever specific property is so delivered, whether originally or by way of substitution, that moment the pledge becomes effective, to continue so long as the possession continues, and irrespective of whether the property so held is by way of substitution or otherwise.

The Illinois chattel mortgage statute has no application to a pledge or to a warehousing of goods. This court, as well as the supreme court of Illinois, has expressly held that

that act refers only to mortgages, trust deeds, or other conveyances of personal property, and not to conditional sales, agreements, consignments, leases, and other transactions involving personal property, which do not involve the execution of a *conveyance* of personal property for the purpose of creating a mortgage lien.

C. & A. R. R. Co. *vs.* Union Rolling Mill Co., 109 U. S., 702 (pg. 724).

Gilbert *vs.* National Cash Register Co., 176 Ill., 288 (pg. 294).

It is a general rule that chattel mortgage acts do not apply to *pledges*.

22 Am. and Eng. Encyc. of Law (2d ed.), pg. 845.

Pearshall *vs.* Eggert, 54 N. Y., 18.

And the right to pledge property exists independently of any statutes, and rests upon the doctrine of the common law.

22 Am. and Eng. Encyc. of Law, pg. 845.

A clear distinction seems to be made by the authorities between a mortgage and a pledge, and it seems to be uniformly held that, in cases of a *pledge*, a substitution, even with the consent of the pledgee, does not in any respect invalidate or affect the pledge, but the property which is substituted for the removed property is held in lieu of the latter.

Colebrooke on Collateral Security (2d ed.), sec. 15.

22 Am. and Eng. Encyc. of Law (2d ed.), pg. 862.

Clark *vs.* Iselin, 88 U. S., 360 (pg. 368).

Cook *vs.* Tullis, 85 U. S., 332.

Sawyer *vs.* Turpin, 91 U. S., 114.

Fidelity Ins. Co. *vs.* Roanoke Iron Co., 81 Fed., 439.

Cherry *vs.* Frost, 7 Lea (Tenn.), 1.

Blydenstein *vs.* N. Y. S. & T. Co., 67 Fed., 469.

The case at bar was one of pledge, and the fact that substitutions occurred as to some of the pledged property without the knowledge of the storage company or petitioners would therefore appear to be immaterial.

Union Trust Co. *vs.* Trumbull, 137 Ill., 146, is sufficient authority that substitutions do not invalidate an equitable lien.

Respectfully submitted,

HENRY S. ROBBINS,
Counsel for Petitioners.

WALLACE HECKMAN,
JAMES G. ELSDON,
Of Counsel.

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Supreme Court, U. S.
FILED
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JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1898.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners*

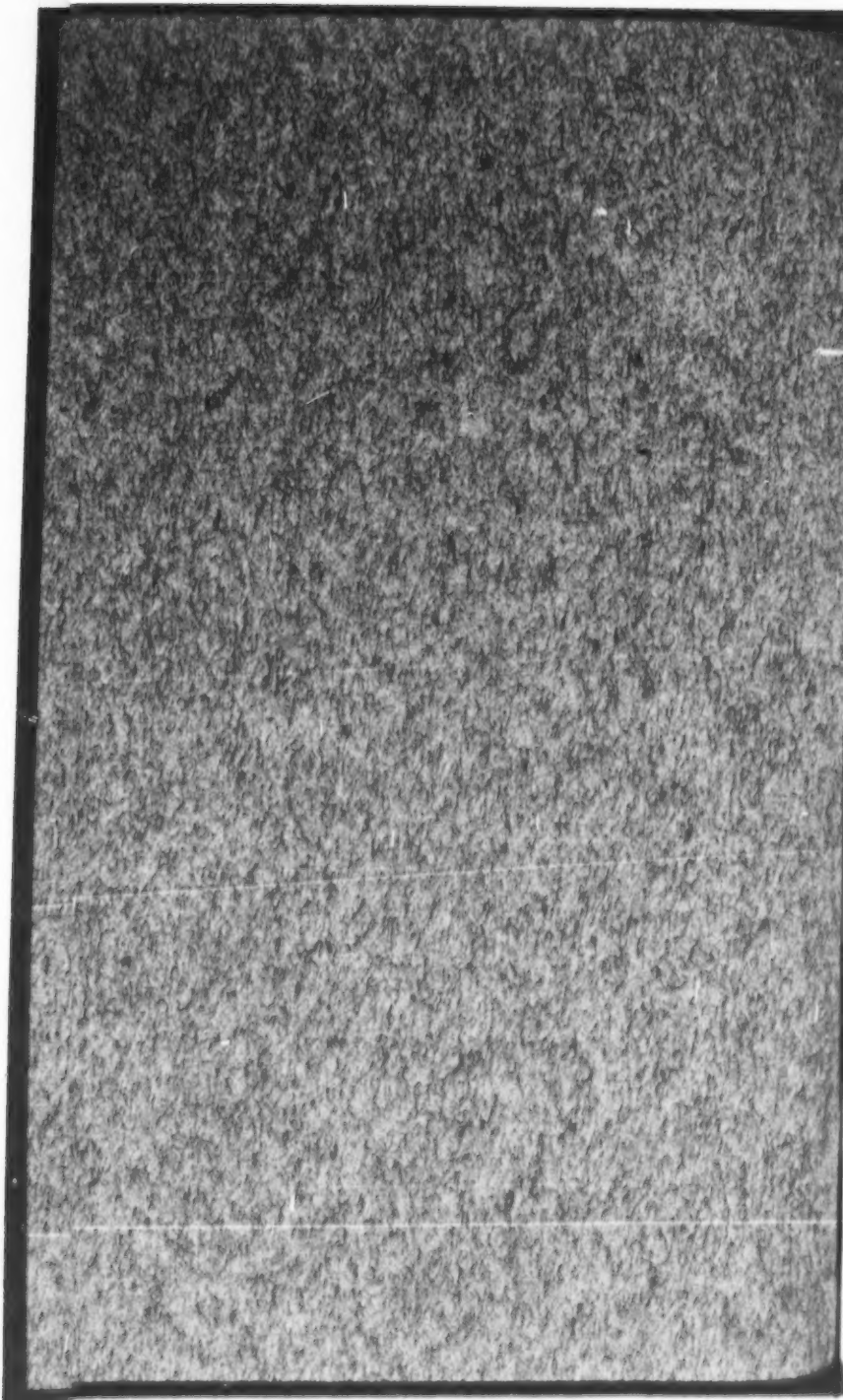
vs.

THE CHICAGO TITLE & TRUST COMPANY, *Trustee of* ALEXANDER ROGERS, *Deceased*, JAMES A. PATTEN *et al.*, *Respondents*

Petition for Certiorari.

OBJECTIONS OF TRUSTEE AND JAMES A. PATTEN TO THE ISSUANCE OF THE WRIT.

JOSEPH M. PATTEN and
NEWTON WYMAN,
For Respondents, Trustee and James A. Patten.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, JAMES A. PATTEN et al., *Respondents.*

Petition for Certiorari.

OBJECTIONS OF TRUSTEE and JAMES A. PATTEN TO THE ISSUANCE OF THE WRIT.

It is with reluctance that the respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten, yield to the conviction that it is necessary to make a more detailed statement of the pleadings and also of the facts in this case than has been made by Petitioners. It is their opinion, however, that some important matters have been omitted and that an additional brief statement of both should be made that this court may be accurately advised of the condition of the record. The argument as to the legal questions involved should properly follow these statements and they therefore present their objections to the petition for the writ of *certiorari*, and respectfully submit their argument and comments in the following order:

I. As to the Pleadings.

II. As to the Facts.

III. As to the Law of Illinois Relating to the Validity of the Alleged Liens Sought to be Enforced.

IV. As to the Right of Appeal to the United States Circuit Court of Appeals.

V. As to the Right of the United States Circuit Court of Appeals to Treat the Appeal as a Petition for Review, if the Appeal was Technically Improper.

VI. As to the Rights and Title of the Trustee Against Secret or Fraudulent Lien Holders.

I.

As to the Pleadings.

The voluntary petition in bankruptcy was filed by Alexander Rodgers, the bankrupt, on May 8, 1901, and the respondent, Chicago Title and Trust Company, was appointed receiver the same day (Rec., 2). The bankrupt at once turned over to such receiver all of his property, including certain seed upon which the petitioners claim a lien by virtue of certain so-called warehouse receipts issued by the National Storage Company, and on May 13, 1901, the receiver filed a petition for leave to sell the seed and hold the proceeds subject to the rights of all parties and the further order of the court (Rec., 5-6). The petitioners herein, the First National Bank of Chicago and H. W. Rogers & Bro., filed special appearances setting up their alleged liens, denying that the receiver had possession of the property, and therefore challenging the

jurisdiction of the court to make the order (Rec., 8-11 and Rec., 12-15). The storage company filed a similar answer and other parties also answered, and on May 20, 1901, an order was entered referring the several petitions and answers to the referee to take proofs and report his conclusions and recommendations to the court (Rec., 28). On August 5, 1901, the referee's report was filed, with which he returned a transcript of all the testimony taken and from which testimony he concluded that the National Storage Company at the date of the appointment of the receiver, was in possession of the premises of the bankrupt and of the property described in the so-called warehouse receipts, qualified by certain findings of fact showing the nature of that possession, and that the District Court was without jurisdiction and recommended that an order be entered finding the receiver was not entitled to the possession of the property described in such receipts (Rec., 29-45). Objections and exceptions were filed by respondents to this report and on August 5th, 1901, upon the hearing upon said report, the petitions, answers, etc., an order was entered in the District Court finding that "the said receiver received and took possession from the bankrupt peaceably the property in question, namely, the several lots of seed described and set forth in the answers of the First National Bank, H. W. Rogers and Brother and the National Storage Company, in the warehouse 220 to 230 Johnson street, Chicago, and that the court had jurisdiction and possession of the said property in this cause and the court sustains the objections and exceptions to said report as to the jurisdiction and possession of the court." In the same order the court also found on the advice of counsel for all the parties—"all parties being in open court"—that the seed should be sold at once and by

agreement it was ordered that it be sold by the First National Bank and the funds held subject to the further order of the court (Rec., 54-55). The present petitioners did not appeal from this order holding adversely to them as to jurisdiction. The property was sold and report of sale made to the court (Rec., 56 to 66). On September 16, 1901, the First National Bank filed a petition entitled, "Petition of the First National Bank of Chicago for allowance of claim," in which it set forth certain indebtedness and the delivery to it of these so-called warehouse receipts as security therefor, by virtue of which it claimed an equitable lien (Rec., 70), as afterwards amended, a lien (Rec., 114), on proceeds of the sale in its hands and prayed that its "claim may be allowed and that the same may be satisfied and paid out of moneys now on deposit," etc. On September 23, 1901, H. W. Rogers & Bro. also filed a petition alleging an indebtedness of the bankrupt to them and the delivery of these alleged warehouse receipts as security therefor and asking a rule on the receiver to show cause "why an order should not be entered herein directing the payment to your petitioners of the amount of said note, principal and interest according to the terms thereof, out of the proceeds of the sale of said seed" and pray for "such other or further or different relief in the premises as the nature of the case may require and as to *equity* shall seem meet." (Rec., 80-83.) Neither the petitioners nor the National Storage Company filed their claims for allowance as debts under the Bankruptcy Act. Objections by way of answer were filed to these petitions and to the claims set forth therein by these respondents, denying the grounds of relief, and alleging, with other things, that the Storage Company had never had possession or control of the premises of the

bankrupt, or any portion of the seed involved, but that the bankrupt had always had such actual possession and control, and in the regular course of his business had sold and disposed of many of the lots of seed supposed to be called for by the alleged warehouse receipts, and had substituted other seed in the place thereof. (Rec., 84-96.) On October 11, 1901, an order was entered consolidating the petitions for hearing and referring the same to the referee to take additional proof and report same to the court, and that thereupon the matters involved in said petitions and answers be heard on such evidence and the evidence heretofore taken by the referee (Rec., 109). On October 29, 1901, as appears from the decree entered of that date the whole matter was heard, both as to the original petition filed by the receiver and answers thereto *and* the subsequent petitions filed by the First National Bank and H. W. Rogers & Bro., in which decree the court found that it had jurisdiction, that the receiver on May 13, 1901, had no right of possession of the property, that the National Storage Company had possession at that date and when the petition in bankruptcy was filed, that the First National Bank had a claim against the bankrupt of $9,854.15 and interest and that H. W. Rogers & Bro. had a similar claim of $5,000 and interest, and directing the payment of such claims out of the proceeds of the sale of the seed in the hands of the First National Bank (Rec., 114-116). It will thus be seen that this final order was entered upon the prayer of the present petitioners in this court as much as upon the original petition filed by the receiver for the sale of the seed.

We cannot conceive of a more forcible manner in which in a proceeding instituted by a trustee, the adverse parties or "proposed defendants" could consent thereto. (See

Bankruptcy Act, Sec. 23 (b).) The respondents excepted to said decree and prayed an appeal therefrom to the United States Circuit Court of Appeals, which was allowed. Both of petitioners herein, The First National Bank of Chicago and H. W. Rogers & Bro., entered their general appearance in the Circuit Court of Appeals, (Rec., 368, 369, 373, 374) without questioning the jurisdiction of that court. The cause was argued by printed briefs and orally in their behalf (Rec., 372) and as stated by their present counsel in their brief filed in this court (page 11), "the point of jurisdiction of the subject-matter was made * * * only on the petition for rehearing." In other words, their attitude was this—they desired the Court of Appeals to affirm the decree of the District Court, but afterwards when the court had reversed the decree of the District Court, they maintained the Court of Appeals had no right to hear the case at all.

II.

As to the Facts.

The facts are so fully and fairly set forth in the statement and opinion of the Court of Appeals, that we should perhaps content ourselves by simply referring thereto. The case was fully argued in that court orally and elaborate printed briefs and arguments were submitted. The statement of facts made by that court, therefore, is apt to be more correct and unprejudiced than any made by counsel. We desire to present very briefly, however, some matters not fully covered therein.

It may be true, as claimed by counsel in their brief, that the National Storage Company was authorized by its charter to issue lawful warehouse receipts. What it was

authorized to do, however, and what it actually did in this case, are two very different things. The National Storage Company purported to lease from Alexander Rodgers, the bankrupt, all the premises occupied and used by him (compare lease, Rec., 214-215, with lease, Rec., 131-132, as explained by testimony, Rec., 215, 216; also referee's report, Rec., 31), and not a portion, as stated in counsel's brief. Under Section 4 of its agreement with Rodgers (Rec., 129), it was authorized to build on the premises enclosures in which to store property on which receipts were issued, but this in fact was never done. "The floors were large, open floors, about sixty by one hundred feet in size, and have no partitions." (Rec., 35.) Theoretically it took possession of the property and held it until the receipts were canceled, but actually it did nothing of the kind. It permitted Rodgers to exercise the same authority and control over it, that he did before the receipts were issued. On this point the testimony of Mr. Rodgers is uncontroverted. After discussing his premises and his method of handling and selling seed, etc., he stated as follows (Rec., 216):

> "I used those premises all the time in the way that I have described, ever since I have been there. Have used the premises since August 1, 1900 (date of storage company's lease), in just the same way. There has been no change whatever in the way I handled it. I used the premises just the same all the time since I have had them."

The storage company never had any keys to the premises and never exercised any acts of possession over them. It paid no rent and its possession was a fiction pure and simple. In the language of the opinion of the Court of Appeals the bankrupt

> "remained in possession of the premises as before the agreement, continuing to transact his business there

as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the storage company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the storage company, or giving notice to the world that any other than the bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued, there was placed a small tag, which might be discovered upon careful search. The bankrupt substantially treated the property as his own; at times going through the forms prescribed by the storage company; and whenever he found it necessary, ignoring them."

The use of the above signs was the only means employed by the storage company to take its alleged possession of the premises, or of any of the seed on which it issued its so-called warehouse receipts, except that in the latter case one of their employes claimed he went upon the premises occasionally to count the bags for which such warrants were issued.

We have set forth the above facts fully for the purpose, among other things, of showing the ludicrousness of the finding of the referee that the storage company had the possession of the premises and seed. This finding was confirmed by the District Court, and great stress is laid upon these findings by counsel for petitioners. In truth, no ultimate fact was found by the referee or by the District Court as to possession, but the conclusion of law as to possession was reached from the above facts. The District Court wrote no opinion and gave no reasons for its finding, but we have the process by which the referee

reached his conclusion, fully set forth in the report which the District Court approved in its decree. In this report (Rec., 31) he says:

> "Upon the execution of the lease, the National Storage Company proceeded to take possession of the premises leased by it from the bankrupt *by tacking on the walls of the several floors notices, each being made of enameled tin, about three by seven inches in size, with white letters on dark blue ground, said signs being eight in number, and distributed on the several floors and containing the following: 'This property controlled by the National Storage Company, as public warehouse, warehouse premises No. 281.' Said signs were placed some seven or eight feet from the floor on the side of the building and on the partitions between the premises in question and the electric company. No signs were placed on the outside of the building.*"

He then finds (Rec., 32) that on each lot of bags for which a so-called warrant was issued, the company placed a card four by six inches in size, on which was printed in letters, about one-quarter inch in height, the following words:

WAREHOUSE CARD.

NATIONAL STORAGE COMPANY.

DATE AUGUST 31, 1900.

LOT NO. 8, SEC. NO. 8.

250 BAGS.

TIMOTHY SEED.

NO DISTURBANCE PERMITTED WHILE THIS CARD IS POSTED.

These eight tin signs, scattered over six stories and a basement, all large in area, and one of these small cards on each pile of seed, being all the evidence of possession found, he reaches the following conclusion (Rec., 41):

> "I think the lease made to it by the bankrupt, and the possession thereunder, *as herein set forth,* was sufficient for the purpose of accomplishing the end desired, namely, to be sufficient to entitle the storage company to the possession of the premises, and its possession was thereby sufficient to entitle it to issue receipts on property placed in its custody."

III.

As to the Law of Illinois Relating to the Validity of the so-called Liens Sought to be Enforced.

The policy of the law of Illinois is decidedly adverse to any sort of secret lien, without regard to the form adopted. The sale of goods with the reservation of the title in the vendor until the purchase money is paid, a chattel mortgage on a stock of goods which permits the mortgagor to carry on his usual trade as to such stock, the ordinary lease of sewing machines, and transactions of that character, are declared fraudulent *per se* by the laws of that state. The policy of that law is already familiar to this court, as is indicated by its decision in the case of *Hervey v. R. I. Locomotive Works*, 93 U. S., 664. In that case this court says:

> "Secret liens, which treat the vendor of personal property, who has delivered possession of it to a purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are to be held constructively fraudulent as to creditors. * * * The plaintiff cannot complain, as the laws of Illinois pointed out a way to preserve and protect his lien."

There are only two ways, under the laws of Illinois, in which a valid lien upon personal property may be given; first, by chattel mortgage, properly recorded; sec-

ond, by pledge, in which the actual and physical possession of the property is delivered to the pledgee, or to some one for him. The policy of the Illinois law was quite fully discussed in the case of the *Union Trust Company* v. *Trumbull*, 137 Ill., 146. We shall discuss that case in its bearings upon the case at bar a little more fully hereafter, but under the present heading we desire to make two brief quotations.

On page 180 of the opinion we find the following statement:

> "There is no mode under our law, except by chattel mortgage duly acknowledged and recorded, by which the owners of personal property retaining its possession can give another a lien upon it that can be enforced as against creditors and subsequent purchasers."

Again, on page 173 of the opinion we find the following statement:

> "To the existence of a pledge, the possession, either actual or symbolical, by the pledgee, of the personal property which is the subject of the pledge, is absolutely essential. Ordinarily, actual and physical possession of the property is delivered to and retained by the pledgee; but where the actual delivery is to a carrier or warehouseman, and a bill of lading or warehouse receipt is given therefor, the assignment or transfer of such bill of lading, or indorsement of such warehouse receipt, with delivery thereof to the pledgee, is regarded in law as the delivery of possession to the pledgee of the property which the instrument represents, the bill of lading or receipt standing in the place of the property of which it is the symbol. (*Taylor* v. *Turner*, 87 Ill., 296; *Michigan Central Railroad Co.* v. *Phillips et al.*, 60 *id.*, 190; *Barton* v. *Curyea*, 40 *id.*, 320; *Canadian Bank* v. *McCrea et al.*, 106 *id.*, 281.) But it is a necessary condition to the existence of such symbolical possession by the pledgee that the property itself is

in the possession of some person or corporation other than the pledgor. Here the endorsements and transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, both because the National Storage Company did not have possession and control of the wool, and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the receipt. The storage company was not, under the law, authorized to issue warehouse receipts."

We also refer the court to the following cases:

Barnet v. *Fergus*, 51 Ill., 352.
Funk v. *Staats*, 24 Ill., 645.
Huschle v. *Morris*, 131 Ill., 591.
Chickering v. *Bastress*, 130 Ill., 206.
Murch v. *Wright*, 46 Ill., 487.
Deering & Co. v. *Washburn*, 141 Ill., 153.
Peoria Mfg. Co. v. *Lyons*, 153 Ill., 435.

IV.

The Right of Appeal to the United States Circuit Court of Appeals.

An appeal lay from the District Court, and the Circuit Court of Appeals had jurisdiction of the appeal taken. The petitioners had a right to carry the case from the Circuit Court of Appeals to this court by appeal or writ of error, and there is no occasion or necessity for a writ of certiorari.

a. The controversy in the District Court was in the nature of an independent or plenary suit, presented on the equity side of the court under its general powers, and

the right of appeal existed under Section 24 (a) of the Bankruptcy Act.

b. There was such right of appeal, also, under Section 6 of the Act of 1891, creating the Circuit Courts of Appeals which is not abridged by the Bankruptcy Act.

c. Even if this is a controversy in bankruptcy proceeding, as distinguished from an independent suit, the right of review upon facts and proof as well as law is given by the Circuit Court of Appeals, Act of 1891, and Section 24 (a) of the Bankruptcy Act.

This controversy, from its inception, through all stages, up to the time when petitioners filed their petition for a rehearing of the decree of reversal entered by the Circuit Court of Appeals, was in form of pleadings, and, in fact, a proceeding in equity, and so treated by all parties.

As pointed out above in these objections, and as appears from the pleadings and the facts of this case before as well as after the petitioners had invoked the jurisdiction of the District Court, there was a full controversy upon the facts as to who was in the actual possession of the seed and property in question at and before the time the petition in bankruptcy was filed. The District Court having entered a decree upon its view of what the facts were as presented to it in the evidence taken, these respondents took an appeal to the Circuit Court of Appeals to obtain a review of the whole case. (Rec., 350, 351, 355, 358, 359.)

The First National Bank, Rogers & Brother and the National Storage Company duly entered their unqualified appearances in the Circuit Court of Appeals (Rec., 368-370), and thereby joined in the errors assigned, and sub-

mitted nothing in objection to the character of the appeal or to the right of appeal. In fact, as they point out in their present brief on this petition for certiorari, they made objection to the jurisdiction of the Circuit Court of Appeals or motion to dismiss the appeal "only in the petition for rehearing." (Petitioners' brief, p. 11.)

What is such independent suit or controversy, it appears is plain and easy of definition. Such suit or proceeding or controversy is one which might have been instituted and litigated had there been no proceedings in bankruptcy—had there been no petition filed in bankruptcy, voluntary or involuntary—such suits or proceedings, at law or in equity, as the bankrupt might have carried on against the opposite party. They would include attempts to set aside transfers or conveyances by way of mortgage or pledge, the recovery of property, and the like. Whatever the form of the proceedings in this case, they were, in fact, the same as they would have been had the general creditors of the bankrupt attached the seed in question in the State Courts, and the petitioners here had been obliged to assert there their alleged claims and liens.

The substantial position in the present case is this: Certain alleged transfers or pledges of his property were made by the bankrupt, which were attacked by the trustee as invalid against the trustee representing the general creditors. Under certain circumstances the litigation would have fallen in the State Courts, but the character of the controversy is not altered by the simple fact that the proceeding was carried on in the District Court.

Nor, would the fact that, had the bankrupt himself brought the action in an attempt to relieve himself against the transfers or pledges, he could not prevail on account

of his own acts, alter the case. It has been clearly pointed out that Section 23 b of the bankruptcy act, does not fail of application simply because the bankrupt could not have successfully maintained the suit to set aside the transfer made by him. The question of jurisdiction is one thing; the successful prosecution of the litigation is another. The question of jurisdiction, aside the power of the court to determine the rights of the trustee and opposite parties is unquestioned, although the bankrupt himself might not recover or prevail on the facts.

> "The clause concerns the jurisdiction only, and not the merits, of a case; the forum in which the case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision.
>
> "The incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it."
>
> *Bardes* v. *Bank*, 178 U. S., 524.

This court in the case of *Bardes* v. *Bank*, points out that Congress intended by the second cause of Section 23, that controversies not strictly or properly part of the proceedings in bankruptcy but independent suits brought by the bankrupt to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come under the jurisdiction of the District Court of the United States, unless by consent of the proposed defendant. Also, that the provisions of said clause control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, *or to set aside transfers of property to third persons alleged to be*

fraudulent against creditors, including payments in money or property to preferred creditors.

The following cases illustrate what is a controversy or suit, not a part of administrative proceedings merely, and what is appealable and reviewable upon the facts as well as law.

Turning to the case of *Hutchinson v. Otis, in the* Circuit Court of Appeals, First Circuit (115 Fed., 937), that court says:

> "With reference to a proceeding in the District Court in the nature of a summary intervening petition under general juridical rules and not controlled by Section 57 of the Bankruptcy Act of July 1, 1898, an appellate tribunal would not be limited to matters of law, and it could pass on the entire merits, as in other ordinary appeals concerning such petitions."

In the case of *Scott & Co.* v. *Wilson*, 115 Fed., 284 (Circuit Court of Appeals, 7th Circuit), it was held that a petition filed by parties claiming certain property in the possession of the receiver was in the nature of an equitable replevin and an independent suit, and that the proceedings in the District Court were reviewable by a direct appeal, as in all cases in equity.

A case very similar to the one involved in the present case is that of *Stelling* v. *Jones Lumber Company*, 116 Fed., 261, in the 7th Circuit. The appeal from the District Court was attacked as an improper method of bringing up the case, but it was held, that the case came properly before the court by appeal. In that case the trustee asked leave to sell certain lumber in his possession, and that the Jones Lumber Company be restrained from interfering. It was held that the proceedings were not "one in bankruptcy," but were in substance a bill in equity

against a stranger, of which the court below had jurisdiction by the consent of the defendant; and also that the Circuit Court of Appeals took jurisdiction by appeal, not by virtue of the bankruptcy act, but under the general provisions of the law creating the Circuit Courts of Appeals, and cited *Boonneville Nat. Bank* v. *Blakey*, 107 Fed., 891, Circuit Court of Appeals, 7th Circuit.

Referring to Section 6, of the Circuit Courts of Appeals Act, the case of *Duncan* v. *Landis*, 106 Fed., 839 (3rd Circuit), says:

> "The language here used indicates an intention to extend the reviewing authority of the court of appeals widely enough to include all final decisions in the District Courts not otherwise provided for by law, and the writ of error referred to in this provision is applicable alike to judgments of the District Court and of the Circuit Court, where such a writ is necessary and appropriate to invoke the reviewing authority of the Appellate Court. In addition to this general and comprehensive provision of the statute establishing the Circuit Courts of Appeals, which, we think, sufficiently warrants the writ of error in this case, the Bankrupt Act of 1898, provides in Section 24 a, as follows: [Here, the court sets out said section.] We perceive nothing in the provisions of this section inconsistent with or which supercedes the provision of Section 6, Cl. 1, of the act establishing Circuit Courts of Appeals, above referred to. The language of the section conferring upon the Circuit Court of Appeals appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy over which they have appellate jurisdiction in other cases is broad and applicable to all 'controversies arising in bankruptcy proceedings.'"

The case of *Steele* v. *Buel*, 104 Fed., 968 (8th Circuit), involved a claim of exemptions by the bankrupt and denied by the trustee. It was objected that the ap-

peal was not taken within ten days, as required by Section 25 of the Bankrupt Act, and the court held, that the limitation of the section had no application, as the case did not fall under either of the three heads of that section, but it was held that the rule "applicable to this case is found in Section 24, which gives the right of appeal in absolute terms, without any limitation as to time other than that fixed by law for the regulation of appeals generally."

Petitioners do not controvert the correctness of these decisions, but seek to escape their force by now claiming that they did not consent to be sued in the District Court. Consent is not a matter of words so much as acts, as is clearly set up in *Booneville National Bank* v. *Blakey, supra.*

The doctrine of this court, as announced in *Elliott & Co.* v. *Toeppner*, 23 S. C. Rep., 133, is that Section 25 of the Bankruptcy Act is not a limitation upon the general appellate jurisdiction of the Circuit Court of Appeals, as conferred by the Act of 1891.

In *Duncan* v. *Landis*, 106 Fed., 839, cited by this court in the above case, a writ of error to review the rulings of the District Court upon a trial by jury arising in a bankruptcy proceeding was allowed, under the general appellate jurisdiction of the Circuit Court of Appeals in common law cases; it necessarily follows that the equivalent of a writ of error in a law case, namely, a general appeal in a chancery proceeding, is equally allowable though it arises in connection with a bankruptcy proceeding to enable the court of appeals to review a question of fact, or questions of fact and law. The general right of appeal in an equity proceeding to the Circuit Court of Appeals under the Act of 1891, is

equally as great as the right to a writ of error in a law case, and if the Bankruptcy Act, much less Section 25 a, of that act, is held not to limit the one right it cannot limit the other.

In a plenary or independent suit brought in the District Court, and there litigated by consent under Section 23 b, the right of a general appeal is unquestioned under Section 6 of the Act of 1891, creating the Circuit Courts of Appeals; if a suit of the same character arises in connection with bankruptcy proceedings because the subject of litigation has passed to the trustee in bankruptcy, such suit becomes "a controversy in bankruptcy proceedings," in which an appeal lies "from the courts of bankruptcy" by virtue of Section 24 a, as well as Section 6 of the Act of 1891.

V.

As to the Right of the United States Circuit Courts of Appeals to treat the Appeal as a Petition for Review, if the Appeal was Technically Imroper.

While respondents maintain with confidence that the circumstances of this case class it as an independent suit or a controversy in bankruptcy proceedings, and not as a mere proceeding in bankruptcy, they, nevertheless, present a few suggestions on the subject of petitions for review, and the taking of an appeal as informally a petition for review.

a. The point raised by petitioners is not one as to real jurisdiction, but as to matter of form and practice merely; and the case having been submitted in the Circuit Court of Appeals by all parties without objection, and

there determined, petitioners are estopped and cannot now present the point of practice.

b. The findings and report of the referee, approved by the District Court in its decree, were a part of the findings of that court and characterized the possession mentioned in the decree of the court, showing such possession to be no actual possession whatever, and such findings of the referee are a part of the findings certified to the Court of Appeals, and considered by it.

c. In such cases of informal petitions for review, by way of appeal, the Circuit Court of Appeals can consider the whole record, which has been certified up to it, and submitted by the parties without objection, as embodying the facts upon which the law is to be revised, and revise it accordingly.

It is at once obvious that there is no real question of want of jurisdiction raised, or attempted to be raised, by the petitioners, but that the point presented amounts to a mere question of practice. The "want of jurisdiction" alleged, is not of that character that requires the proceedings to be dismissed whenever the point is made or noticed; for there is no question, in proceedings of this nature, of the ample jurisdiction of the Circuit Courts of Appeals over the subject-matter of review and revision of the decisions of the District Courts.

If this case in the District Court was a bankruptcy proceeding, from the decree in which a petition for revision, and not an appeal, was the proper method to obtain a review in the Circuit Court of Appeals (if there is such limitation to a petition for revision), yet, the case having been carried to the latter court by an appeal, and that court having full jurisdiction to review bankruptcy proceedings whether by petition or appeal, and the case

having there been submitted by all parties without objection, it must now be concluded that the court itself, as well as the parties, waived all objections to the form in which the jurisdiction of that tribunal was invoked.

The jurisdictional requirement as to due notice set forth in the bankruptcy act having been satisfied in this case under the method pursued in taking the case to the Circuit Court of Appeals, as well as it would have been had the form used been that of a petition for review, and, especially, no objection having been raised at the hearing or before the decree in the Circuit Court of Appeals, the petitioners cannot now be heard to say that the mere matter of form and pleadings used in invoking the jurisdiction of the appellate tribunal was not waived by their thus submitting the case upon its merits to that tribunal, and that the court of appeals did not disregard the matter of form, and review the case as if brought before it by petition.

The very position of petitioners, that the Circuit Court of Appeals had jurisdiction to review had there been a petition for review instead of an appeal, concedes the contention that their objection goes only to the form in which the case came to that court.

Their objection, now made for the first time, being to a matter of form and not of substance, comes too late.

That the objection is upon a question of practice, and not of want of jurisdiction, has the support of a number of the Circuit Courts of Appeals.

In re Richards, 96 Fed., 935 (7th Circuit).

In re Abraham, 93 Fed., 767 (5th Circuit).

Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593 (4th Circuit).

The District Court in its decree approved and confirmed the referee's report and findings therein, except as to jurisdiction. (Rec., 114.) This made that report and the findings therein the findings of the District Court, and the finding in the decree as to the "possession" of the storage company must be taken in connection with and in view of the findings of the referee adopted by the court.

This report is found on pages 29 to 44 of the Record, and is in some of its essentials set out above under head II of these objections. The facts constituting the so-called possession as they actually were are there found, which show absolutely that there was no actual possession or control in the storage company. It is true the referee and the court drew from these findings of fact certain conclusions as to possession, which were mere conclusions of law; but the facts are there *found,* and were certified to the Circuit Court of Appeals, and that court must be taken to have revised the law thereon.

Further, it may be well maintained that where the whole evidence that was before the District Court is certified up to the Circuit Court of Appeals under the form of an appeal, although only a petition for review would be the proper practice, and is there submitted to the court without objection by the parties, and especially where there is no conflict of evidence as to the material facts, the Court of Appeals can revise the law of the whole case, as on a petition, using the evidence as the statement of facts.

In re Richards, 96 Fed., 935 (7th Cir.).

Treated as a petition for review, the decision of the court was just and proper, and is supported by other United States Courts. No reason for the granting of a writ of *certiorari* appears, either on the ground of great importance or of conflict of decisions.

VI.

As to the Rights of the Receiver or Trustee Against Secret or Fraudulent Lien Holders.

The point is made that the receiver or trustee is not in any better position to question the validity of the so-called liens in this case than the bankrupt was. In our judgment this position is not correct and we think counsel for petitioners are led into the error largely through misinterpreting the decision in the case of *Union Trust Company* v. *Trumbull, supra.* The court in that case disapproved of the attempted pledge and held in substance that it was invalid and ineffectual as against execution or attaching creditors or subsequent purchasers, but held that inasmuch as the proceedings under the state assignment law were purely voluntary and the assignee being a mere volunteer that he could not procure any transfers to be set aside, that it was not in the power of the assignee to set aside; that if the assignor could not deny their validity the assignee could not do so, and therefore it allowed the claimants in that case what was practically a lien by estoppel. The object of the present Bankruptcy Act, however, and its provisions are very different. While it provides that voluntary petitions may be filed, the right to file a petition by the creditors of the insolvent to bring him into court involuntarily always remains. Although the decision in the case of *Union Trust Company* v. *Trumbull* is not binding on this court, it is proper to compare the decision and the law which required it to hold as it did, with the present Bankruptcy Act.

In its decision in that case, at page 179, the court said:

> "The settled doctrine is, that when property is assigned by debtors for the payment of debts of the

> assignors, the assignee takes it as a volunteer, and subject to all liens, equities and burdens to which it was subject in the hands of the assignors (citing cases). This principle is recognized in Section 11 of the Voluntary Assignment Act of 1877, wherein it is provided that any assignee or assignees * * * shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor or debtors had at the time of the assignment * * * and generally to act and do whatsoever the said debtor or debtors might have done in the premises. The general rule is, that an equitable lien is enforceable against voluntary assignees."

As against the reasoning of this decision and the provisions of the law under which it was rendered, we have the following provision of the Bankruptcy Law:

> "Sec. 70 (a). The trustee of the estate of a bankrupt, upon his appointment and qualification and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * to all * * * property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Under the law of Illinois the bankrupt unquestionably could have sold the seed in question at the date of filing the petition, or it could have been levied upon and sold under judicial process against him.

In addition to this plain provision of the Bankrupt Act the general purpose is shown through all its provisions to guard against liens and preferences. Suits and attachments under certain conditions are to be set aside, preferences declared void, pledges and mortgages annulled, et cetera. Nor can there by any difference as to the status

of his property or the title of the trustee, that the bankrupt voluntarily files his petition, than there would be if creditors file the petition. The law will certainly not be construed so as to give the trustee less title in one case than it would in the other.

In re Frazier, 117 Fed. Rep., 746.

In discussing the meaning of the paragraph above quoted from the bankruptcy act, we beg to call the court's attention to the forcible argument presented for the construction which we maintain in the closing paragraph of the opinion of the Circuit Court of Appeals for the Fourth Circuit in *Chesapeake Shoe Co.* v. *Seldner,* 122 Fed. Rep., 593:

> "If the 'title of the bankrupt,' in Section 70a, means title as between him and a consignor or vendor, this section of the act is not only utterly inconsistent with the entire spirit of the law, but the numerous decisions holding that the trustee in bankruptcy takes title to property sold to the bankrupt under unrecorded conditional contracts of sale must be held erroneous. The registry statutes of the states do not invalidate the title of the vendor by such a contract as between him and his vendee, but only as between the vendor and the creditors of the vendee. Quite aside from the violence done to the plain meaning of the words, 'title of the bankrupt * * * * to property * * * which might have been levied upon and sold under judicial process against him,' Clause 4 of Section 70a would seem to make an end of the contention here set up. The trustee takes 'the title of the bankrupt * * * to * * * property transferred by him in fraud of his creditors.' If the words, 'title of the bankrupt,' do not mean title as between him and his creditors, the language above quoted is meaningless. As between the bankrupt and his fraudulent grantee, the bankrupt has no title (*Spencer* v. *Duplan Co.* (C. C.), 112 Fed., 638), and to give any effect, or even mean-

ing, to Clause 4, we must construe the words 'title of the bankrupt as meaning title as between the bankrupt and his creditors."

The rights of the trustee in bankruptcy, and the interpretation put upon Section 70(a) of the bankrupt act by the Circuit Court of the Seventh Circuit in this case, has also the support of the following decisions:

In re Pekin Plow Co., 112 Fed., 308 (Eighth Circuit).

Spencer v. *Duplan Silk Co.*, 112 Fed., 638 (C. C.).

Duplan Silk Co. v. *Spencer*, 115 Fed., 689 (Third Circuit).

In re Garcewicz, 115 Fed., 87 (Second Circuit).

Chesapeake Shoe Company v. *Seldner*, 122 Fed., 593 (Fourth Circuit).

Stroud v. *McDaniel*, 106 Fed., 493 (Fourth Circuit).

Mueller v. *Nugent*, 184 U. S., 1.

The decision of a Circuit Court of Appeals on a petition for revision being final, *certiorari* will issue in the discretion of this court only in cases of great public importance, or where there is a conflict in the decisions of the lower courts on questions of law on which uniformity of decisions is important and possible. The rights of the trustee against secret or fraudulent lien holders is in every case affected by the policy of the law of the state where the property in controversy is located, and hence absolute uniformity of decision is impossible.

In view of the pronounced policy of the law of the State of Illinois as to the invalidity and fraudulent character of secret liens, and in view of the apparent attempt to circumvent the laws of that state by the specious device of the so-called storage warrants used in this case, we

respectfully insist that the decision of the Circuit Court of Appeals, in this case, is clearly right in law and eminently just in equity.

Respondents have set forth rather fully the condition of the pleadings in this case and have discussed the facts and the law relating thereto as briefly as possible, and they suggest in conclusion that the petition for the writ of *certiorari* should be denied for the following reasons:

1. The appeal was properly taken to the United States Circuit Court of Appeals and the petitioners could have brought the case before this court by appeal.

2. If the case in the Circuit Court of Appeals was treated as a petition for revision, the decision of that court is sustained, by the decisions of all courts of equal degree that have passed upon the same questions.

3. The decisions of the Circuit Courts of Appeals, when viewed—as they necessarily must be—in the light of the state laws where the property in dispute is located, are uniform as to the title taken by the trustee in bankruptcy.

4. In view of the laws of Illinois and the apparent attempt to evade them, which the record presents, the decision of the Circuit Court of Appeals is just and equitable.

5. No question of such grave and public importance is presented as calls for the issuance of a writ of *certiorari*.

We respectfully submit that the writ of *certiorari* be denied.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

To Messrs. Henry S. Robbins and Wallace Heckman,
Counsel for Petitioners above named.

PLEASE TAKE NOTICE, that on the calling up of motion in cause of *Union Trust Company and Security Warehousing Company* v. *Henry L. Wilson, Trustee in Bankruptcy of Harry L. Flanders,* to set the same for hearing with or following this case, No. 139, these respondents will present in case No. 139 their objections and suggestions, copies of the same being herewith served upon you.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, The Chicago Title & Trust Company and James A. Patten.

RECEIVED copies of the foregoing notice and objections this ——— day of November, A. D. 1904.

———,

———,
Counsel for Petitioners.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

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CERTIORARI.

Counsel for respondents, The Chicago Title & Trust Company, Trustee, and James A. Patten, having been served with notice of motion by appellants in the case of *Union Trust Company and Security Warehousing Company* v. *Henry L. Wilson, Trustee in Bankruptcy of Harry L. Flanders,* File No. ——, Term No. ——, to advance and set that case for hearing at the same time as, or immediately following, this cause, and that said motion would be presented at the motion hour on November 14, 1904, these respondents desire respectfully but earnestly to object to any postponement of this cause for hearing beyond the time the same would regularly be reached upon call, and to having the time of respondents

for presentation and argument of this case abridged upon the hearing.

And respondents show:

(1) That this case has, for a case arising in bankruptcy, already been long pending, the particular controversy here involved having begun in May, 1901.

(2) Respondents have given notice of motion to quash the writ of certiorari returned in this cause, to be presented at the motion hour the 5th day of December, 1904, and if said motion is granted this cause will not be decided in this court upon the merits.

(3) Respondents conceive this case to be very different in its facts from those in the case proposed to be advanced.

Respectfully submitted.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, The Chicago Title & Trust Company, Trustee, and James A. Patten.